BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

FILED
11-14-16
04:59 PM

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	Investigation 15-11-007 (Filed November 5, 2015)

RESPONDENT COALITION REPLY COMMENTS ON PROPOSED DECISION

Isabelle Salgado
Gregory L. Castle
David P. Discher
David J. Miller
AT&T Services, Inc.
2150 Webster Street, 8th Floor
Oakland, CA 94612
Tel: (510) 645-4581
Email: gc1831@att.com
Attorneys for AT&T California and New Cingular Wireless PCS, LLC

Christian F. Binnig
J. Tyson Covey
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
Tel: (312) 782-0600
Attorneys for AT&T California and New Cingular Wireless PCS, LLC

Lesla Lehtonen
California Cable & Telecommunications Association
1001 K Street, 2nd Floor
Sacramento, CA 95814
Tel: (916) 446-7732
Email: lesla@calcable.org
Attorney for CCTA

James W. McTarnaghan
Anne B. Beaumont
Perkins Coie LLP
505 Howard Street, Suite 1000
San Francisco, CA 94105
Tel: (415) 344-7000
Email: jmctarnaghan@perkinscoie.com
Attorneys for Charter Fiberlink-CCO, LLC and Time Warner Cable Information Services (California), LLC

Suzanne Toller
Peter Karanjia
Zeb Zankel
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111-6533
Tel: (415) 276-6500
E-mail: suzannetoller@dwt.com
Attorneys for Comcast Phone of California, LLC

David P. Murray
Michael Hurwitz
Eric Schmidt
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006-1238
Tel: (202) 303-1000
Email: dmurray@willkie.com
Attorneys for Comcast Phone of California, LLC

November 14, 2016

[*additional parties on next page*]

Mark P. Schreiber
Patrick M. Rosvall
Sarah J. Banola
COOPER, WHITE & COOPER LLP
201 California Street, 17th floor
San Francisco, CA 94111
Phone: 415-433-1900
Facsimile: 415-433-5530
Email: prosvall@cwclaw.com

Attorneys for Consolidated Communications of California Company and Consolidated Communications Enterprise Services

Margaret L. Tobias
Tobias Law Office
460 Pennsylvania Avenue
San Francisco, CA 94107
Tel: (415) 641-7833
Email: marg@tobiaslo.com
Attorney for Cox California Telcom, LLC

Chuck Carrathers
Frontier Communications
Mail Code CAM21LB
2535 W. Hillcrest Drive
Newbury Park, CA 91320
805-535-5310
chuck.carrathers@ftr.com
Frontier Communications of California, Frontier Communications of the Southwest Inc., and Frontier California Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Codes

Federal Communications Commission Orders and Reports

Page(s)

California Public Utilities Decisions

Other Authorities

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	Investigation 15-11-007 (Filed November 5, 2015)

RESPONDENT COALITION REPLY COMMENTS ON PROPOSED DECISION

Pursuant to Rule 14.3(d) of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules"), the Respondent Coalition[1] respectfully submit these reply comments addressing comments filed by other parties on the *Proposed Decision Analyzing the California Telecommunications Market and Directing Staff to Continue Data Gathering, Monitoring and Reporting on the Market* ("PD"), issued in *the Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042, Investigation* 15-11-007 (the "OII").[2]

I. INTRODUCTION AND SUMMARY

The Commission should reject Intervenors' requests to revisit issues that the PD properly addressed or to compound errors in the PD that should be corrected. Most importantly, the Commission should reject Intervenors' proposals to open a second phase of this proceeding to

[1] Respondent Coalition includes the following: Pacific Bell Telephone Company d/b/a AT&T California (U1001C), and New Cingular Wireless PCS, LLC (U3060C) (collectively, "AT&T"); the California Cable & Telecommunications Association ("CCTA"); Charter Fiberlink CA-CCO, LLC (U6878C); Comcast Phone of California, LLC (U5698C); Consolidated Communications of California Company (U1015C) and Consolidated Communications Enterprise Services (U7261C); Cox California Telcom, LLC, d/b/a Cox Communications (U5684C); Citizens Telecommunications Company of California Inc. d/b/a Frontier Communications of California (U1024C), Frontier Communications of the Southwest Inc. (U1026C), and Frontier California Inc. (U1002C) (collectively "Frontier"); and Time Warner Cable Information Services (California), LLC (U6874C). CCTA represents companies providing cable, broadband Internet access and voice services, including Voice over Internet Protocol services, in California. Several of CCTA's member companies or their affiliates have been identified as Respondents in this proceeding.

[2] Per the authorization of the assigned Administrative Law Judge ("ALJ"), Respondent Coalition was granted leave to file consolidated reply comments not to exceed 15 pages. See November 4, 2016 email from ALJ Bemesderfer.

consider regulation to address alleged market failures in the voice, broadband and wholesale markets. Such action would conflict with the established scope of the OII, which was solely to gather and analyze data (Scoping Memo at 7), and the PD's finding that landline voice competition remains strong. Moreover, many of the regulatory actions that Intervenors would have the Commission consider in a second phase are unnecessary and outside the scope of the Commission's jurisdiction. The Commission should instead adopt the PD with the modified Finding of Facts ("FOF"), Conclusions of Law ("COL") and Ordering Paragraphs ("OP") proposed by Respondent Coalition. The requests of non-party Google Fiber, Inc. ("Google Fiber") should also be rejected because they are procedurally improper and raise significant legal, safety and other issues that are well beyond the proper scope of this proceeding.

II. INTERVENORS' ARGUMENTS ON VOICE COMPETITION LACK MERIT

The PD correctly finds that intermodal voice competition has "increased," and "appears strong," so rate regulation is not required. PD at 156-57, (FOF 4, 7(c) & (e)). The record fully supports that conclusion, and the Commission should reject the Office of Ratepayer Advocates' ("ORA") and The Utility Reform Network's ("TURN")'unsupported assertions to the contrary. The Commission found in the 2006 Uniform Regulatory Framework ("URF") Order that the URF incumbent local exchange carriers ("ILECs") lacked market power.[3] Since that determination, the number of California subscribers for Voice over Internet Protocol ("VoIP") service has *tripled*, the number of California adults in wireless-only households has grown *six fold*, and the number of lines for traditional voice services has plummeted 63%, leaving the URF ILECs with less than 15% of the voice market.[4] In short, consumers treat intermodal voice options as head-to-head competitors and voice competition is now even stronger than in 2006.

Intermodal/Wireless Competition. In their respective opening comments, ORA (at 4) and TURN (at 4) claim that "the intermodal approach advanced by the Proposed Decision . . . is not reasonable" and, in particular, that wireless voice service has no impact on wireline voice service. That theory is refuted by the contrary finding in the URF Order and the conclusions of

[3] D.06-08-030 ("URF Order") at 132-33, 265 (FOF 50), 268 (FOF 78) ("ILECs lack market power in voice communications markets.").

[4] Resp. Coalition Opening Br. at 4, 6, 12-20, 30-32. *See also* FCC Report, *Voice Telephone Services: Status as of June 30, 2015*, Supplemental Table 1, California subscriptions tab (rel. Aug. 2016), available at https://www.fcc.gov/wireline-competition/voice-telephone-services-report; FCC Report, *Local Telephone Competition: Status as of December 31, 2006*, Tables 7 and 14 (rel. Dec. 2007).

state commissions and legislatures across the country.[5] It is also refuted by actual consumer behavior: in 2006, just 8% of California adults lived in wireless-only households; by the end of 2015, that number has grown to *47%*, whereas only 5.5% of California adults lived in landline-only households.[6]

TURN also claims (at 6-7) that wireless voice service is not an intermodal alternative because the PD cannot precisely "quantify" the price-constraining impact of wireless voice service on wireline voice service, while ORA (at 4) repeats its erroneous theory that declining wireless voice prices have no impact on wireline voice prices. Dr. Aron already refuted those claims based on several studies showing a positive cross-elasticity of demand for wireless and wireline voice services.[7] Moreover, as Dr. Aron's unrebutted testimony established, Intervenors' emphasis on price increases ignores the artificially low starting point for wireline prices.[8] Millions of customers would not have cut the cord on wireline service unless they viewed wireless as a direct competitive alternative. Such effective competition by definition constrains prices for traditional wireline voice service.[9] Indeed, Dr. Aron showed that basic voice prices have risen more slowly than inflation (*see* PD at 121 n.336), and the URF ILECs' basic stand-alone voice rates are well within the range of reasonable rates as determined by the FCC. Resp. Coalition Reply Br. at 21 n.34.[10]

---

[5] URF Order at 74-76, 128-29; Resp. Coalition Reply Br. at 4 n.7.

[6] National Center for Health Statistics, "National Health Interview Survey Early Release Program," Table 1 (rel. Aug. 2016) (issued by Centers for Disease Control), available at www.cdc.gov. *See* Coalition Br. at 14-16. ORA (at 1, 10) contends that the PD relies on "outdated reports," but the Respondent Coalition produced the latest data available—CDC cord-cutting surveys and FCC reports released in August 2016—and the CD's 2015 Report is its most recent. Resp. Coalition Reply Br. at *e.g.,* 1-2, 5, 21.

[7] Ex. 5 at 31 n.53 (Aron/AT&T 6/1 Testimony); Ex. 28 at 9, n.9 (Gillan/Cox 6/1 Testimony). Neither ORA witness Dr. Selwyn nor any other witness replied to or disputed Dr. Aron's analysis of those econometric studies. The PD's assertion (at 37 note 95) that Dr. Selwyn addressed the cross-elasticity studies is incorrect, for the cited portion of Dr. Selwyn's testimony has nothing to do with those studies and does not purport to address them.

[8] Ex. 7 at 5:11-15 (Aron/AT&T 7/15 Testimony); 7/20/16 Tr. at 86-87 (Aron); *see also,* CPUC Communications Division, "Market Share Analysis of Retail Communications in California June 2001 through June 2013," at 24 (dated January 5 2015) (noting that AT&T's rates have increased, but that "for AT&T their rates could reasonably be considered to have started at 'below market' levels.") (*hereafter* "CD 2015 Report").

[9] Ex. 1.5 at 4:2-5, 8:23-9:4 (Katz/AT&T 3/15 Testimony); Ex. 5 at Appendix 1 (Aron/AT&T 6/1 Testimony); Ex. 41 at 3:18-20 (Topper/Joint Respondents 6/1 Testimony).

[10] TURN also speculates (at 10-11) that carriers with wireless affiliates may increase wireline voice rates above market levels so that some fraction of their customers might switch to the wireless affiliate. But there is no evidence that this actually happens or that it would make any economic sense to do so.

Alleged Market Concentration. TURN (at 5-8) contends that the PD undervalues alleged concentration in the voice market, asserting that the "wireline voice market" is "highly concentrated[11]" and the voice market for AT&T customers is "moderately concentrated." Those arguments lead nowhere because they are based on a false premise (*i.e.*, that intermodal alternatives are not in the voice market). The PD (at FOF 1, 7(c) & (e)) properly concludes that competition for wireline voice service is intermodal; thus, allegations about a "wireline only" market are irrelevant, and a "moderate" concentration level in the intermodal market is not a cause for competitive concern -- especially when the concentration level is steadily declining and already close to the non-concentrated level, as the CD 2015 Report found.[12] Moreover, TURN rests its entire "concentration" argument on HHI computations, which is exactly what expert economists in the case said the Commission should *not* do.[13] HHIs can be misleading in a historically regulated area like telecommunications that also is subject to rapid technological change, and therefore "provide[] no information relevant to [an] assessment of ILEC market power . . . ." URF Order at 128 & 265 (FOF 52). TURN's error confirms the need for the PD to clarify that HHI measurements cannot be viewed in isolation and instead should be viewed as just one data point among many. *See* Resp. Coalition at 5.[14]

Service Quality. The PD correctly finds (a) that service quality issues are not part of this proceeding; and (b) that alleged low service quality sheds little light on the extent of competition

---

[11] Contrary to TURN's claim, the PD found that the retail intermodal voice market is the "least concentrated" and that concentration levels have declined from highly concentrated to moderately concentrated since 2001. PD at 72-73.

[12] CD 2015 Report at 13-15. The CD 2015 Report showed a steady decline in the HHI for the intermodal voice market and all California markets. TURN (at 6) repeats Dr. Rocyroft's attacks on the findings of the CD 2015 Report, but Dr. Aron already thoroughly refuted Dr. Roycroft on that point. Ex. 7 at 14:13-16:9 (Aron 7/1 Testimony).

[13] *See* Ex. 41 at 34:13-37:17 (Topper/Joint Respondents 6/1 Testimony); Ex. 1.5 at 14:7-18 (Katz/AT&T 3/15 Testimony); Resp. Coalition Reply Br. at 38-39.

[14] TURN also contends (at 8-9) that the PD makes key "findings" that require a conclusion that wireline voice service does not face meaningful competition. But TURN cites nothing in the PD for these alleged "findings," because the PD never made them. The PD does not find that voice-broadband bundles have no price-constraining impact on stand-alone voice service; rather, it treats bundles and stand-alone voice as part of the intermodal voice market. *See e.g.*, PD at 26, 122. The PD does not find that wireless voice service imposes no price discipline on wireline voice service; rather, it finds that there is such price discipline (as TURN (at 11) admits), although it is difficult to quantify. PD at 37. And the PD does not (and could not) find that prices for basic voice service have risen independent of changes in cost or other economic inputs, nor could it, since the base from which they have risen was an artificially low regulated rate, not a market price. *See supra* n.8.

faced by traditional wireline voice service. PD at 110. ORA (at 12) and TURN (at 14-15) argue that the PD should consider alleged service quality issues in the competition analysis here,[15] but the appropriate venue for addressing service quality is a separate proceeding *on service quality*. *See, e.g.,* R.11-12-001; PD at 110; *accord*, URF Order at 209.

Section 451.[16] ORA (at 5) and TURN (at 20-22) also argue that to satisfy Section 451 the Commission must reach a definitive conclusion on whether rates for traditional wireline voice service are just and reasonable. But this is not a complaint case; it is a "data gathering and data analysis" exercise. Scoping Memo at 7. Pursuant to its promise in the URF Order (at 156) to remain vigilant in keeping tabs on competition in the wireline voice market, the Commission gathered the data and the PD analyzes it to provide a "descriptive snapshot" of the market today. PD at 31. The PD finds that competition, while ever-changing, remains strong and therefore there is no basis to depart from URF or re-impose rate regulation.[17] The PD's conclusion is fully consistent with the Legislature's and URF Order's goals of relying on competition to promote and protect consumer interests[18] and with decisions dating back to 1984 to rely on competition to constrain rates when competition exists.[19] To the extent ORA and TURN believe the PD should

---

[15] There is no credible evidence in the record that supports a conclusion of a systematic or industry wide failure associated with voice service quality. Moreover, even if the Commission were to find certain isolated instances where improvements to service quality may be warranted, competition permits customers to vote with their feet.

[16] All section references hereafter are to the California Public Utilities Code, unless stated otherwise.

[17] ORA asserts that the PD "recognizes" that "the best way to gauge whether rates are just and reasonable is to compare the rates to the underlying costs." ORA at 8-9 (citing PD at 137 [*sic*, should be 140]); *see also* TURN at 9-10 (proposing cost-based rate analysis). The PD says no such thing. All the PD does is quote Ms. Baldwin's inaccurate claim on that point and then proceed to explain (at 140-41) why it is of no help here. Indeed, any proposals based on such financial or accounting measures would only serve to distort incentives and behavior, thus undermining the operation of a competitive market. Ex. 1.5 at 15:9-16:20 (Katz/AT&T 3/15 Testimony); Ex. 6 at 16:20-19:12 (Katz/AT&T 6/1 Testimony); Ex. 41 at 13:7-14:5 (Topper/Joint Respondents 6/1 Testimony); D.08-09-042 ("URF Transition Order") at 22 ("our preference is to rely upon market forces rather than cost-of-service studies wherever feasible"; "There simply is no basis in the record to consider that price regulation based on cost studies is necessary to ensure that the prices are just and reasonable.").

[18] *See* URF Order at 30-41, 138-141, 151-153, 163, 168-169, 182, 192, 201, and 261 (FOF 8, 9, 10). TURN argues that the PD should separately analyze the reasonableness of stand-alone voice rates, but the PD (at 110) correctly found that the voice market is intermodal and includes bundles as well as stand-alone service. TURN (at 22) also urges separate rate regulation for the most vulnerable consumers, but the PD correctly defers such matters to the public policy programs established to address them.

[19] *Re Competition in the Provision of Telecommunications Transmission Services*, Decision No. 84-06-113, *Opinion*, 15 Cal. P.U.C.2d 426, 1984 WL 1021582 (Cal.P.U.C. June 13, 1984); *Re Competition for Local Exchange Service*, Decision No. 96-03-020, *Opinion*, 65 Cal. P.U.C.2d 156, 1996 WL 283179 (Cal.P.U.C. Mar. 13, 1996), 169 P.U.R.4th 83; *Re Application of AT&T Communications of California,*

be more explicit, the Respondent Coalition proposes an additional Conclusion of Law in Supplement Appendix A to this brief.

Findings of Fact. ORA (at App. A) proposes that large amounts of discussion from the PD be included as Findings of Fact, not only as to the voice market, but also as to the broadband and wholesale markets, as well as other topics. This suggestion is both improper and unnecessary. Not every statement in a decision qualifies as a "Finding of Fact" or "Conclusion of Law" that is essential to the final result. Rather, the author of a decision determines which findings and conclusions are essential to the holding and require special inclusion at the end of the decision. The inclusion of the additional findings proposed by ORA are particularly inappropriate because they appear to "pick and choose" the portions of the text that support their position without providing the requisite context and balance.

Rehearing of D.08-09-042. ORA (at 8-9) and TURN (at 22-25) ask that the PD be revised to expressly rule on the petitions for rehearing of D.08-09-042. That is simple enough, because the PD's correct finding of robust competition for traditional wireline voice service and decision not to re-impose rate regulation require denial of those 8-year-old petitions. The PD can and should be amended to make that denial explicit. See Supplemental Appendix A.

III. INTERVENORS' COMMENTS ON RESIDENTIAL BIAS MISCONSTRUE THE COMMISSION'S JURISDICTION AND THE OII'S SCOPE AND RECORD

A. The Commission Should Reject Intervenors' Request to Make Additional Findings and Take Additional Regulatory Action on BIAS

Relying on the findings in the PD,[20] Intervenors request that the Commission intervene to correct perceived and unfounded failures in the broadband Internet access service ("BIAS") market. *See* Opening Comments of the Greenlining Institute and the Center for Accessible Technology ("Greenlining/CforAT") at 10-11, TURN at 2-3, 14; ORA at 2-3. For example, TURN asks the Commission to initiate a second phase of this proceeding to "determine … regulatory responses to" alleged "market failures in both the voice *and broadband* markets." TURN at 14 (emphasis added). Indeed, TURN (at 13) appears to suggest that the Commission consider rate regulation as a tool to ensure affordable rates for BIAS. ORA similarly proposes

---

Inc. to be Designated a Non-Dominant Interexchange Carrier, Decision No. 97-08-060, *Final Opinion*, 1997 WL 475415 (Cal.P.U.C. Aug. 1, 1997).

[20] ORA also selectively proposes to add certain text from the PD as findings; s*ee also infra,* at 6 (Findings of Fact) (addressing the impropriety of ORA's proposed addition of multiple findings, repeating text from the PD).

the Commission consider in the next phase price or earnings regulation (at 3) and structural remedies such as unbundling and interconnection (at 8).[21] Moreover, all the Intervenors support the PD's ongoing data submission requirements in OPs 1 and 2. As Respondent Coalition explained in detail in its comments, any regulation of broadband—including the data submission requirements of OPs 1 and 2—fly in the face of Section 710 and exceed the established scope of the OII, the focus which is on data gathering and analysis and landline voice service. Resp. Coalition at 6-11; *see also* Consolidated at 4. As Greenlining/CforAT (at 9) and TURN (at 2) acknowledge, the Commission decided *not* to adopt regulations in this proceeding, and thus, Intervenors' requests to the contrary must be rejected.

Even if the Commission had jurisdiction to regulate BIAS—which Section 710 forbids—the PD itself correctly recognizes that any Commission action must be consistent with FCC forbearance decisions. PD at 161-162 (COL 8). Indeed, the FCC bars a state from acting contrary to the overall "regulatory scheme" set forth in the *2015 Open Internet Order*[22]—including by regulating BIAS where the FCC chose to forbear.[23] Yet, a number of the measures Intervenors propose are precisely those from which the FCC expressly forbore in the *2015 Open Internet Order*[24] and those forbearance decisions necessarily preclude the Commission from taking the actions urged by Intervenors, even assuming it otherwise had any jurisdiction.[25]

---

[21] Although it is not entirely clear from its comments on the PD that ORA is proposing to extend these specific measures to BIAS, in its brief, ORA asserted that these and other proposed measures should be "considered in a next phase of the proceeding to remedy the market failures and violations of Section 451 described above." ORA Opening Br. at 68-73.

[22] *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 2015 FCC LEXIS 731 *(hereafter* "*2015 Open Internet Order*").

[23] *See 2015 Open Internet Order,* 30 FCC Rcd at 5682-83 (¶ 188), 5804 (¶ 432-33) ("We also make clear that the states are bound by our forbearance decisions today" and announcing FCC's "firm intention to exercise our preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored regulatory scheme we adopt in this Order.").

[24] *Id.* at 5603-04 (¶ 5), 5769 (¶ 417), 5814 (¶ 451), 5854-55 (¶ 519) ("we forbear from all ex ante rate regulations, tariffing and related recordkeeping and reporting requirements [and] unbundling and network access requirements [that would otherwise apply due to reclassification].").

[25] *Id.* at 5804 (¶ 433) ("we intend to … preempt any state regulations which conflict with this comprehensive regulatory scheme or other federal law….For example, should a state elect to restrict entry into the broadband market through certification requirements or regulate the rates of broadband Internet access service through tariffs or otherwise, we expect that we would preempt such state regulations as in conflict with our regulations.").

B. There is No Basis for Findings of Fact on the Digital Divide

Greenlining/CforAT (at 2-4) take issue with the PD's conclusions on the digital divide, arguing for more detailed findings regarding rural, tribal, disabled, and low-income consumers. But as the PD explains (at 110) and discussed in the Respondent Coalition (at 7-8), digital divide matters are not part of this investigation. The PD appropriately deferred such issues to proceedings or public policy programs specifically designed to address such matters.

Furthermore, there is no record to support any further examination of "digital divide" issues. Greenlining/CforAT rely entirely on hearsay and anecdotal claims that were never tested by cross-examination. The findings they propose go far afield, addressing topics like affordability (which the OII (at OP 2) and PD (at 110) excluded from this proceeding) and sufficiency of deployment (which is the province of the Connect America Fund, CASF, and other programs). *See* PD at 110; Greenlining/CforAT, Appx. A, proposed FOF 10.

IV. THE COMMISSION SHOULD REJECT INTERVENORS' SUGGESTIONS FOR ADDITIONAL REGULATION OF WHOLESALE INPUTS

Both ORA (5-7) and TURN (19-20) contend that the recommendations on wholesale inputs adopted by the PD are deficient and urge further Commission action. Although TURN (at 20) appears to limit its recommendation to urging the Commission to participate in the FCC's BDS proceeding,[26] ORA (at 7) goes further—recommending additional wholesale findings[27] and the continuation of this rulemaking or a new proceeding "to determine new policies or solutions to address the lack of competition in the California wholesale telecommunications market." In such further proceeding, ORA (at 7) advocates that the Commission consider various actions, including structural wholesale-retail separation, interconnection and unbundling requirements, and development of a public wholesale broadband network. As explained below, the law and record simply do not support these requests, and they should be rejected. Indeed, Intervenors' requests reinforce the Respondent Coalition's point (15-16) that all findings about the wholesale market should be removed from the PD.

As justification for further regulation of the wholesale market, ORA (at 5) mistakenly asserts that "the lack of a competitive [wholesale] market violates Public Utilities Code § 451's

[26] Although it is unclear, TURN (at 20) may also be proposing some modification of the monitoring scheme for wholesale market; however TURN proposed no changes to OP 2.

[27] *See also, infra* at 6 (addressing the impropriety of ORA's proposed addition of multiple findings, repeating text from the PD).

requirement that rates be just and reasonable and that service be safe and reliable." This claim rests on a fundamental misunderstanding about the regulatory framework for the wholesale inputs and how rates are set for such inputs. Most critically, to the extent that the rates for the wholesale inputs discussed in the PD are subject to the Commission's jurisdiction, they are already regulated. For example, rates for UNEs are governed by the federal Telecommunications Act of 1996 and FCC rules, and such rates are either cost-based (TELRIC-based) or negotiated and included in interconnection agreements approved by the Commission.[28] 47 U.S.C. § 252(d)(A)(i); 47 C.F.R. §§ 51.501 *et seq*. Similarly, rates for pole attachments are subject to a formula established in statute and Commission decisions.[29]

With respect to special access, the PD accurately concludes (and Intervenor witnesses confirm)[30] that the "FCC is the primary regulatory authority" for special access (PD at 101-102) and that most special access lines in California are interstate and under exclusive federal jurisdiction. PD at 418, n.405. The Commission has no jurisdiction to set rates for virtually all special access services, and Section 451 is irrelevant to these services.[31] Nor can the Commission impose "structural remedies such as unbundling" (ORA at 7); only the FCC has such authority.[32] ORA's suggestion for a public wholesale broadband network is similarly unlawful given that the FCC has already decided to forbear from imposing last-mile unbundling requirements, as several commenters argued against such a regulatory obligation on the grounds that it "*has led to depressed investment in the European broadband marketplace*." *2015 Open Internet Order*, 30 FCC Rcd at 5769 (¶ 417) (emphasis added).[33]

---

[28] In fact, AT&T California and CLECs recently agreed to mutually acceptable UNE rates that were approved via the Commission's advice letter process. Resp. Coalition Opening Br. at 32 & n.40.

[29] P.U. Code § 767.5 (establishing a statutory formula for cable pole attachment rates) and D.98-10-058, mimeo at 54 (extending that rate to CLECs); D.16-01-46 (establishing rate for CMRS attachments); *see also,* 47 U.S.C. § 224.

[30] *See* Resp. Coalition Opening Br. at 29; CALTEL Opening Br. at 19-20.

[31] To the small extent that carriers use intrastate special access circuits, those are provided under tariffed, regulated rates. *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers; In the Matter of the Application of Pacific Bell (U 1001 C)*, Decision No. 89-10-031, 1989 Cal. PUC LEXIS 576, 33 CPUC2d 43.

[32] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004) (in the 1996 Act, "Congress left to the [FCC] the choice of elements to be 'unbundled'"); *BellSouth Telecomms., Inc. Request for Declaratory Ruling*, 20 FCC Rcd. 6830, at ¶ 22 (2005).

[33] CALTEL (at 2-5) focuses on a closed Webpass application for arbitration with AT&T California -- an issue never raised before in this proceeding, never mentioned in the PD, and beyond the scope of this

In sum, the record does not support and the Commission should not open a second phase of this proceeding or a new proceeding to consider additional regulation of these wholesale inputs or rates.

V. INTERVENORS' PROPOSED CHANGES TO THE ORDERING PARAGRAPHS ARE NOT JUSTIFIED AND NEITHER THEIR PROPOSED CHANGES NOR THE OPS SHOULD BE ADOPTED

Beyond their flawed advocacy regarding the PD's specific findings, Intervenors also propose significant changes to the PD's OPs that would (i) expand access to confidential data, and (ii) open an entirely new proceeding or expand this proceeding to include a second phase. These changes likewise should be rejected.[34]

A. The PD Should Not Provide for Intervenors' Access to the Carriers' Highly Confidential Form 477 Data and Critical Infrastructure Information

Intervenors seek access to the data that communications providers are required to submit pursuant to OPs 1-2 and to the report analyzing the voice and broadband data that the Communications Division is directed to prepare pursuant to OP 3. *See* ORA App. A at 6-7 (proposed OPs 1-2); TURN at proposed COL 5, OP 3; Greenlining/CforAT at 5-6, 9 & proposed OPs 3-5. As the Respondent Coalition has explained (at 18-19), however, there is no need for the ongoing data submission requirements of OPs 1 and 2 or the preparation of a report under OP 3. Nor is there any basis in the record to support the requests of TURN and Greenlining/CforAT for periodic or quarterly reports. TURN proposed COL 5; Greenlining/CforAT proposed OP 5. The PD correctly found that "competition in the retail intermodal voice market, as measured above, appears strong," (PD at 157 (FOF 7(e)), and Intervenors have failed to rebut that finding or to identify a legitimate reason for new reporting requirements. Greenlining/CforAT (at 11) even acknowledge that it would be inappropriate to develop new rules in this phase of the proceeding. Yet, the data submission requirements constitute new rules that exceed the lawful

---

investigation. The Commission should ignore those comments as irrelevant. Moreover, the Webpass dispute has been settled and dismissed by the Commission. *See* D.16-10-002.

[34] Moreover CALTEL (at 1, 5), alone supports the Commission's novel theory that section 716 authorizes the data collection requirements of OPs 1 and 2. However as Respondent Coalition explained in detail in its comments, Section 716 does not authorize the Commission to collect data prior to an ILEC filing a forbearance petition with the FCC regarding access to unbundled network elements. The plain language of Section 716 limits Commission action to specific parties and circumstances and does not authorize the Commission to establish an *ex ante*, industry-wide, and continuing mandatory data collection. Resp. Coalition at 10-11.

scope of this proceeding. Resp. Coalition at 17.[35]

If the Commission nonetheless were to maintain the reporting requirements, Intervenors fail to demonstrate why they should be entitled to access to such highly confidential information consisting of the communications providers' critical infrastructure information, as well as voice and broadband subscriber and availability data at the census-block level. Providing Intervenors[36] with access to this extremely sensitive information creates an unnecessary risk of improper disclosure and ensuing competitive harm and could even jeopardize national security by threatening critical infrastructure.[37] Moreover, there is no need for Intervenors to have access to this data. Even if the PD retains the direction in OP 3 that the Communications Division prepare a report, it appropriately does not contemplate a role for the Intervenors in analyzing this data or drafting the report. Should the Commission wish to provide Intervenors with access to its findings, it can produce a report revealing only non-confidential aggregated data similar to the FCC's publication of aggregated Form 477 data.

While the Respondent Coalition objects to Intervenors or other parties having access to any data that communications providers are required to submit to the Commission, to the extent the Commission considers granting Intervenors access, it must ensure that the information will be treated as strictly confidential in accordance with federal and state confidentiality requirements. As detailed in Respondent Coalition's opening comments (at 21-23 & App. A at 6-7, proposed OP 4), the Commission should expressly adopt confidentiality protections at least

---

[35] Moreover, the Commission's ability to require ongoing reporting is limited by (i) Section 710 (as to VoIP and BIAS data); (ii) the three-part test in *California Restaurant Ass'n v. Henning* (CTIA at 3-4); and (iii) the *2015 Open Internet Order* at 5856-47 (¶ 508) (as to BIAS data) in which the FCC specifically forbore from applying "provisions of the [Communications] Act that provide 'discretionary powers to compel production of useful information or the filing of regular reports,'" "used by the [FCC] to implement its traditional rate-making authority over common carriers."

[36] TURN's proposed edits to COL 5 and OP 3 refer to "all stakeholders" having access to the data and/or reports of the Commission. Even setting aside the substantive impropriety of the proposal, the Respondent Coalition objects to this term as vague and overly broad as it could encompass competitors and other third parties.

[37] Greenlining/CforAT asserts (at 5-6) that the Commission's authority to make this information available to Intervenors has been largely resolved by the federal court action. That is incorrect. The court order cited by Greenlining/CforAT denied *both* sides' motions for summary judgment, and expressly recognized that the Commission and TURN "have not yet demonstrated that the [Commission's] protective order adequately guards against public disclosure of commercially sensitive data that would cause competitive harm to the companies." *New Cingular Wireless PCS LLC v. Picker* (N.D. Cal. No. 16-cv-02461-VC), Order re Summary Judgement, at 1 (Dkt. 135) (Nov. 3, 2016). In other words, the adequacy of the Commission's confidentiality protections remains a live issue.

as strong as those afforded by the FCC for comparable information.

B. The Requests to Expand or Extend this Proceeding Should be Rejected

After identifying next steps that will occur outside of this proceeding, including the preparation of a Communications Division report in December 2019, the PD appropriately closes this proceeding. PD at 164 (OP 5). Intervenors challenge this action and argue that the proceeding should remain open for additional phases or that a new proceeding should immediately be opened. *See* ORA.at 2-3, proposed OP 5; Greenlining/CforAT at 10-11, proposed OP 6; TURN at 23-25[38], proposed OP 5. These requests should be rejected.

The Scoping Memo made clear that this proceeding is solely "a data gathering and data analysis exercise" (Scoping Memo at 7), as Intervenors acknowledge. ORA at 7; Greenlining/CforAT at 9; TURN at 2. Intervenors' requests to expand this proceeding or commence a new proceeding conflict with the Commission's considered judgment in the Scoping Memo not to impose new regulations in this proceeding. Scoping Memo at 7. And several of the "next steps" proposed in the PD are, as the Respondent Coalition explained in its opening comments (at 16-21), unnecessary and/or ill-advised. Opening a second phase here—in which Intervenors seek new regulation[39]—would only make matters worse. *See Southern California Edison v. Pub. Util. Comm'n*, 140 Cal. App. 4th 1085 (2006). Moreover, to the extent that the Commission decides to proceed with any of the "Next Steps" enumerated in the PD, there is no need to open a new proceeding. In sum, the proposals to extend this proceeding or open a new proceeding (and the corresponding addition of the proposed new Conclusions of Law) should be rejected and this proceeding closed.

VI. GOOGLE FIBER'S PROPOSED RULE CHANGES ARE PROCEDURALLY IMPROPER AND SHOULD NOT BE ADOPTED

The Respondent Coalition generally agrees with the PD's finding that competition is facilitated by ensuring nondiscriminatory access to utility poles and rights-of-way in a timely

[38] TURN's proposal (at 24-25) for workshops purports to "resurrect" an earlier motion filed by carriers on December 9, 2015 requesting that the procedural schedule be suspended to allow workshops to better focus the proceeding at that time. TURN at 24-25. Although TURN now states that it opposed such request as "premature," review of TURN's January 8, 2016 response (with Greenlining and CforAT) shows that TURN strenuously opposed the motion as "represent[ing] delay and manufactured confusion." Based on this opposition, the Commission denied the carriers' motion on February 4, 2016 without workshops and the proceeding continued through exhaustive data collection leading to the PD.

[39] *See e.g.*, ORA at 3 (suggesting that the Commission consider "performance and service availability targets, price or earnings regulation, wholesale/retail restructuring, and support for a public broadband network" in a subsequent phase).

manner, while adhering to reasonable safety requirements. *See* Resp. Coalition at 15-16. That said, as Respondent Coalition explained in its opening comments, the PD must be revised to strike extra-record evidence and related statements about alleged pole access issues.[40]

Non-party Google Fiber, which has played no role in the OII since this proceeding was commenced almost one year ago, requests that the Commission consider *new* rules and pole access processes that raise significant legal, safety and other issues that require careful consideration. To the extent that Google Fiber is suggesting that rules be adopted in this proceeding,[41] its proposal should be dismissed as procedurally improper and disregarded for three separate reasons:

First, Google Fiber is not a party to the OII. Under the Commission's longstanding rules, only parties are permitted to file comments on a proposed decision. Rule 14.3.

Second, Google Fiber's comments fail to "focus on factual, legal or technical errors in the proposed … decision" or to make "specific references to the record or applicable law." Rule 14.3(c). Instead Google Fiber -- over one year into this proceeding -- now asks the Commission to adopt new rules, relying on no evidence or only extra-record materials of dubious probative value.[42] As the Respondent Coalition explained in its opening comments, the adoption of new rules is (as Intervenors concede) outside the scope of this proceeding,[43] and any decision by the Commission must be based on the record.[44] Google Fiber's request is defective on both counts.

Third, Google Fiber failed to utilize the well-established Commission procedures for seeking changes or additions to Commission regulations, which Google Fiber (at 5) itself acknowledges. To the extent that Google Fiber wishes to amend the Commission's right-of-way ("ROW") access rules, it should file a petition requesting such relief. *See* Rules 6.3 and 16.4.

---

[40] This includes not only the newspaper accounts cited in the Respondent Coalition's opening comments (at 16, fn 65), but also the PD's characterization of informal and formal complaints regarding pole access, which reflect only one entity's perspective. PD at 105, fn 303 and related text; PD at 106, fn 305 and related text; PD at 132, fn 362 and related text.

[41] This is unclear because Google Fiber did not propose any addition (e.g. inclusion of a new OP) to the PD.

[42] *See*, *e.g.*, Google Fiber at 8 (regarding its efforts to join the Northern California Joint Pole Association); Google Fiber at 9 (regarding alleged problems with the make-ready process).

[43] Resp. Coalition at 17; *see, e.g.*, Greenlining/CforAT at 11.

[44] *See* P.U. Code §§ 1757 and 1706; *see also* D.14-04-024, mimeo at 11 ("Comments on a PD are mainly for the purpose of identifying errors made in the proposed disposition of the case and are not a forum…to advance novel theories or arguments.").

This is the process AT&T Mobility followed to extend the ROW access rules and rates to commercial mobile radio service wireless attachments and is the process the Commission directed cable companies and CLECs to follow to extend those rules to wireless attachments they attach.[45]

These well-established rules exist for good reason: they ensure that the costs and benefits, as well as the legality and safety impacts of any proposed rule change are adequately considered and weighed.[46] Careful review would be particularly warranted here in connection with Google Fiber's proposed "One Touch Make Ready" procedure. Before adopting any such procedure, the Commission would need to fully consider (1) the consistency of the procedure with existing attachers' rights under state and federal law; (2) its impact on public safety; (3) its impact on other pole attachers' provision of reliable service and the safety of their networks;[47] (4) consistency with the Commission's existing ROW access rules (D.98-10-058) and construction rules (GO 95 and GO 128); and (5) the potential impact on other pole attachers' liability for noncompliant work.[48] All of these considerations confirm that this proceeding—which focuses on the reasonableness of rates for traditional wireline voice services—is not the proper vehicle for such a wide-ranging inquiry into matters that could have significant impacts on public safety.

VII. CONCLUSION

For the reasons stated above, Intervenors' proposals to expand or modify the findings in the PD and for the Commission to open a second phase of the proceeding (or a new proceeding) should be rejected. Instead the PD should be limited to findings regarding the intermodal voice market, consistent with the limited scope of the proceeding and the Commission's jurisdiction, and those findings should be modified consistent with Respondent Coalition's comments. Findings regarding the BIAS and wholesale markets should be excluded, and the PD should be

---

[45] D.16-01-046; *see also* P.16-08-016 and P.16-07-009.

[46] Section 321.1(b). This section states as follow: "The commission shall take all necessary and appropriate actions to assess the economic effects of its decisions and to assess and mitigate the impacts of its decisions on customer, public, and employee safety." *see also, Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards for All Telecommunications Carriers and Revisions to General Order 133-B*, R.98-06-029, 1998 Cal. PUC LEXIS 428, at 76 ("This Commission must carefully weigh the costs and benefits of any such service quality standards to ensure that the benefits that accrue to consumers warrant the additional costs.").

[47] D.98-10-058, mimeo at 72.

[48] The potential liability could be compounded given the Commission's current consideration of a citation program for communications providers. *See*, Draft Resolution SED-3 (issued October 28, 2016).

modified to eliminate the proposed data submission and reporting requirements in OPs 1-3. To the extent that the data submission requirements in OPs 1 and 2 are retained, (i) they should be time-limited and (ii) subject to heightened confidentiality protections. Finally, Google Fiber's pole access proposals should be rejected as procedurally improper and extra-record evidence regarding pole access matters should be stricken from the PD.

Dated: November 14, 2016

Respectfully submitted, pursuant to Rule 1.8(d)

/s/ Margaret L. Tobias

Margaret L. Tobias
Tobias Law Office
460 Pennsylvania Avenue
San Francisco, CA 94107
Tel: (415) 641-7833
Email: marg@tobiaslo.com
Attorney for Cox California Telcom LLC

SUPPLEMENTAL APPENDIX A

Proposed Changes to Findings of Fact, Conclusions of Law, and Ordering Paragraphs

Conclusions of Law:

17. ~~While it is unclear whether t~~The growth of wireless, VoIP, and other alternative means of voice communication has kept competition for ~~prices and services for~~ traditional landline service strong and the evidence does not support a finding that traditional landline voice service rates are anything other than just and reasonable. We therefore continue to rely upon competition to discipline rates for that service and to seek ways to improve~~ing~~ the efficiency of the telecommunications markets within our jurisdiction. ~~should result in rates for traditional landline service that are more just and reasonable.~~

19. Based on the findings and analysis in this decision, TURN's and ORA's joint application for rehearing of D.08-09-042 is denied. We have replenished the record and reassessed our prior assumptions against changes in the market environment and find no basis to depart from the final conclusions in D.08-09-042.